No. 06-1199

IN THE

Supreme Court of the United States

OCTOBER TERM, 2006

MARTIN ZELNIK,

Petitioner,

--against--

FASHION INSTITUTE OF TECHNOLOGY, STATE UNIVERSITY OF NEW YORK, JOYCE F. BROWN, INDIVIDUALLY AS PRESIDENT OF FASHION INSTITUTE OF TECHNOLOGY, STATE UNIVERSITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL WORKRIGHTS INSTITUTE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF PETITIONER MARTIN ZELNIK

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INTEREST OF AMICUS CURIAE

The National Workrights Institute is a not-for-profit organization dedicated to protecting civil liberties in the American workplace. The Institute was founded in 1990 as division of the national office of the American Civil Liberties Union. In 2000, the Institute became an independent organization.

Protecting freedom of expression is a key part of the Institute's mission. The Institute participated as amicus in Wilson v. Graham County, in which this Court considered whistleblower protection under the False Claims Act and also participated in Cotto v. Sikorsky Aircraft, in which the Supreme Court of Connecticut applied its state's statute on employee freedom of expression.

Institute staff members helped draft and enact legislation in California, Colorado, New York, and North Dakota prohibiting employment discrimination based on off-duty political behavior and legislation protecting whistleblowers in Georgia and Rhode Island. Our model legislation articulating the boundaries between protected employee expression and speech which damages the legitimate interests of the employer has been used many time by legislators, advocates, and academics. The Institute has also been involved with numerous initiatives to expand federal legal protection for whistleblowers.

Institute president Lewis Maltby has addressed numerous groups regarding employee freedom of expression, including the National Academy of Arbitrators. His remarks on employer control of employee speech have been featured by the National Law Journal, Bureau of National Affairs, Associated Press, and Legal Times.

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STATEMENT OF THE CASE

Martin Zelnik brought suit in the United States District Court for the Southern District of New York against a public college, Fashion Institute of Technology, State University of New York ("FIT") alleging that FIT and its president had violated his rights under the First Amendment by refusing to grant him professor emeritus status in retaliation for his political speech against a project in which FIT was involved.

Zelnik was full professor at FIT in the Interior Design Department. He retired in 1999 after 30 years as a member of the faculty. He continues to practice as an architect and interior designer.

In early 1999, FIT announced that it intended to close a portion of 27th Street in New York City in order to create a campus like environment. Zelnik expressed concerns regarding aspects of the project that he believed created danger for pedestrians. He helped form a neighborhood association opposing the project and suggesting safer alternatives.

FIT's president, Dr. Joyce Brown, retaliated against Zelnik by refusing to approve his nomination for emeritus professor by the Interior Design Department. Brown sent a memorandum to the chair of the department linking her decision to deny Zelnik tenure to his opposition to the project.

The district court granted FIT's motion for summary judgment. The Court of Appeals for the Second Circuit upheld the decision on different grounds, finding that the denial of emeritus status, even if retaliatory, did not rise to the level of an actionable claim.

REASONS FOR GRANTING THE WRIT

Nothing is more important in our Constitutional system than protecting the right to freedom of expression. Public employers, because they have the ability to inflict severe penalties, are capable of intimidating employees whose speech displeases them. It is essential that the federal courts prevent such intimidation.

This Court has recognized the importance of protecting public employees from retaliation for political activity. In Burlington Northern & Santa Fe Railway Co. v. White, it created a legal standard that effectively accomplishes this goal. An employer's conduct is actionable only if "the retaliatory conduct would deter a similarly situated individual of ordinary firmness from exercising his or her rights". The court of appeals decision in this case, while purporting to follow Burlington Northern, actually recreates the type of ineffective standard that Burlington Northern intended to eliminate.

Other circuits have consistently recognized that a penalty need not be devastating to have an impermissible deterrent effect. For example, in Garcia v. City of Trenton, Missouri, 348 F. 3d 726 (8th Cir. 2003) the court found that receiving four parking tickets totally $35 (in retaliation for complaining to the mayor about town ordinances) was sufficient to support a finding that a person of ordinary firmness would be chilled. The trial judge's post-verdict judgment in favor of defendant was reversible error. In Glass v. Dachel, 2 F. 3d 733 (7th Cir. 1993), the seventh circuit found that a letter of reprimand was sufficiently serious to be actionable.

In the present case, Zelnik claimed that losing the title "Professor Emeritus" made it more difficult for him to obtain clients for his private architectural/design firm. This is not at all far-fetched. Most professors never achieve emeritus status. It is undisputed that the title "Professor Emeritus" increases ones

credibility and respect. This is especially important with individuals who lack first hand experience with a person and must judge them on his or her credentials. One would expect emeritus status to be an asset in business development.

Zelnik also claimed that losing the title "Professor Emeritus" was a significant penalty even if it had no monetary value. In FIT's own words, emeritus status is "an exceptional honor". Academics receive lower financial compensation than the members of their profession that enter the private sector. In some cases, they earn but a fraction of what they would in the commercial world. One of the principal reasons highly capable professionals are willing to make this financial sacrifice is the respect and prestige that are associated with being a professor. Zelnik's claim that losing the prestige of emeritus status is a significant penalty that could deter others from taking political action that offends the college is thus highly plausible.

It is also significant that denying Zelnik the honor of emeritus status is the only penalty that FIT could impose upon him. FIT did not have the ability to impose a greater penalty and decline to impose it. It would be far from unreasonable for others contemplating political action that might offend FIT to believe that the college would impose harsher penalties where it was in a position to do so.

These penalties could easily outweigh those found to be sufficient to support a decision in favor of the plaintiff in cases such as Garcia and Glass.

This does not mean that Zelnik was entitled to summary judgment. Federal courts have consistently held that whether a particular penalty would have an impermissible deterrent effect is an issue of fact to be determined by a jury. Perhaps FIT could have persuaded the jury that the denial of emeritus status is too small a penalty to discourage other professors from speaking their minds.

The case, however, did not go to a jury. Instead, the court of appeals determined that loss of emeritus status would not have an impermissible deterrent effect. This was clearly a question of fact that should have gone to the jury. Bart v. Telford, 677 F.2d 622 (7th Cir. 1982). It is well established that it is reversible error for judges to usurp the province of the jury in this manner.

Federal judges are not well suited to make this factual determination, even if it were theirs to make. Federal judges have life tenure. They cannot be fired for speaking their mind about political issues, nor can they be punished in any other manner. How are they to know the feelings of those who must work without these protections? Cases like these are far better decided by juries, whose life experience enables them to understand what employer actions would intimidate employees.

Moreover, the court below provided no rationale for its decision. It provides literally no explanation for its conclusion that other faculty members would not be intimidated by what happened to Zelnik. One is left with the conclusion that they considered the question too obvious to require thought or explanation. This is the antithesis of the careful consideration of factual issues that we rightfully expect from juries. The apparent ease with which the three members of the court of appeals decided this question illustrates their isolation from the world in which Zelnik and other employees must work.

The decision by the court of appeals is not only incorrect, but destructive. It allows public employers in the second circuit to retaliate against employees when it disapproves of their political speech, knowing that if the penalty appears small the courts will grant summary judgment in their favor. It also encourages public employers in the rest of the country to retaliate by providing them with a precedent that they can argue immunizes them from liability.

Because the issues involved are critical to protecting the first amendment rights of all public employees, and because the decision below is in conflict with the decision of this Court and the decisions of the other circuits, certiorari should be granted.

CONCLUSION

For the foregoing reasons, the National Workrights Institute respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: April 2, 2007